## UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

MICHELLE L. KOSILEK, Plaintiff,	)			
	)			
V.	)	C.A.	No.	00-12455-MLW
	)			
LUIS S. SPENCER, in his official	)			
capacity as Commissioner of the	)			
Massachusetts Department of	)			
Correction,	)			
Defendant.	)			

## MEMORANDUM AND ORDER CONCERNING ELECTROLYSIS

WOLF, D.J. September 4, 2012

On November 25, 2009, the court denied plaintiff Michelle Kosilek's motion for a preliminary injunction, which, if issued, would have required the defendant Commissioner of the Massachusetts Department of Correction (the "DOC") to resume electrolysis treatments Kosilek had previously been receiving. Among other things, the court found that Kosilek had not shown that he was likely to prove the existence of a serious medical need for which electrolysis is necessary to treat adequately, as required by Farmer v. Brennan, 511 U.S. 825, 832 (1994) and its progeny.

On December 21, 2009, Kosilek was allowed to file a Second Amended Complaint requesting as relief an independent medical evaluation by a gender identity disorder specialist to determine if electrolysis is medically necessary, as well as seeking the sex reassignment surgery which was the relief sought in the First Amended Complaint. At the December 21, 2009 hearing on the motion to amend, the DOC was ordered to "select somebody qualified to

evaluate [] Kosilek and provide a report on whether [] electrolysis is medically necessary." Dec. 21, 2009 Tr. at 9. In addition, if the evaluator advised that electrolysis was medically necessary, the DOC was directed to report whether it would provide it. Id. The DOC was ordered to file its report by March 1, 2010.

The DOC did not by March 1, 2010, either file the required report or seek an extension of time to do so. On April 16, 2010, Kosilek moved to preclude any late filing by the DOC. The DOC did not respond to this motion. However, on November 1, 2010, the DOC moved to file late a report in which the DOC's chief psychiatrist, Dr. Robert Diener, advised that electrolysis was not medically necessary for Kosilek. Kosilek opposed that motion.

The DOC's failure to timely file the response to the December 21, 2009 Order extends the pattern of delay in addressing medical issues presented by Kosilek's severe gender identity disorder that is described in detail in the September 4, 2012 Memorandum and Order on Eighth Amendment Claim finding that the DOC has been deliberately indifferent to Kosilek's serious medical need and ordering the DOC to provide him with the sex reassignment surgery that is necessary to treat his condition adequately. However, the court did not consider or rely upon any of the evidence relating to the dispute regarding electrolysis in reaching its decision concerning sex reassignment surgery because it has not heard any testimony regarding that dispute. Nor is the court now issuing any order concerning electrolysis, in part because the sex reassignment

surgery that has been ordered will be a material change in circumstances regarding any arguable serious medical need Kosilek may have for electrolysis. Accordingly, it is hereby ORDERED that:

- 1. Defendant's Motion to Late File Report on Electrolysis (Docket No. 526) is ALLOWED.
  - 2. Plaintiff's Motion to Preclude (Docket No. 521) is DENIED.
- 3. To the extent that Count I of the Second Amended Complaint requests a medical evaluation by an independent gender identity disorder specialist to determine whether electrolysis is medically necessary, the request is DENIED without prejudice.

/s/ MARK L. WOLF
UNITED STATES DISTRICT JUDGE

## **Publisher Information**

Note\* This page is not part of the opinion as entered by the court.

The docket information provided on this page is for the benefit of publishers of these opinions.

Plaintiff Michelle Kosilek represented by Frances S. Cohen

Bingham McCutchen LLP

One Federal Street

Boston, MA 02110

617-951-8872

Fax: 617-951-8736

Email: frances.cohen@bingham.com

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joseph L. Sulman

Law Office of Joseph L. Sulman, Esq.

185 Devonshire Street, Suite 502

Boston, MA 02110

617-521-8600

Email: jsulman@sulmanlaw.com

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Jared A. Craft

Bingham McCutchen LLP - MA

One Federal Street

Boston, MA 02110

617-951-8640

Email: jared.craft@bingham.com

ATTORNEY TO BE NOTICED

٧.

Defendant Department of Correction for the State of Massachusetts represented by Joan T. Kennedy

Department of Correction

Suite 600

70 Franklin Street

Suite 600

Boston, MA 02110

617-727-3300

Fax: 617-727-7403

Email: jtkconstant@doc.state.ma.us

**LEAD ATTORNEY** 

ATTORNEY TO BE NOTICED

Richard C. McFarland

Commonwealth of Massachusetts, Department of Correction

70 Franklin Street

Suite 600

Boston, MA 02110

617-727-3300 X 132

Fax: 617-727-7403

Email: rcmcfarland@doc.state.ma.us

LEAD ATTORNEY

ATTORNEY TO BE NOTICED Defendant Michael T. Maloney

TERMINATED: 04/20/2010 represented by Joan T. Kennedy

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Richard C. McFarland

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED Defendant University of Mass.

Medical School

TERMINATED: 07/01/2005 Defendant M.D. Arthur K. Brewer

TERMINATED: 06/14/2005 represented by David A. Hilton

Morrison Mahoney LLP

250 Summer Street

Boston, MA 02210

617-439-7500

Fax: 617-342-4864

Email: dhilton@morrisonmahoney.com

**LEAD ATTORNEY** 

Victoria A. Crawshaw

Morrison MahoneyLLP

250 Summer Street

Boston, MA 02210

617-439-7546

Fax: 617-342-4955

Email: vcrawshaw@morrisonmahoney.com Defendant Harrison O'Connor

TERMINATED: 07/01/2005 Defendant Kenneth Applebaum

TERMINATED: 07/01/2005 Defendant Karen Dewees

TERMINATED: 07/17/2001 Defendant Correctional Medical Systems

TERMINATED: 06/14/2005 represented by Bruce R. Henry

Morrison Mahoney LLP

250 Summer Street

Boston, MA 02210

617-439-7500

Fax: 617-342-4851

Email: alkennedy@morrisonmahoney.com

TERMINATED: 12/20/2004

**LEAD ATTORNEY** 

David A. Hilton

(See above for address)

**LEAD ATTORNEY** 

Stephen M. O'Shea

Martin, Magnuson, McCarthy and Kenney

101 Merrimac St.

Boston, MA 02114

617-227-3240

Fax: 617-227-3346

Email: soshea@mmmk.com

**LEAD ATTORNEY** 

ATTORNEY TO BE NOTICED

Victoria A. Crawshaw

(See above for address) Defendant Kathleen M. Dennehy

TERMINATED: 09/21/2007 represented by Richard C. McFarland

(See above for address)

**LEAD ATTORNEY** 

ATTORNEY TO BE NOTICED

Joan T. Kennedy

Department of Correction

70 Franklin Street

Suite 600

Boston, MA 02110

617-727-3300

Fax: 617-727-7403

Email: jtkconstant@doc.state.ma.us

ATTORNEY TO BE NOTICED Defendant Does 1 through 100 represented by Joan T. Kennedy

(See above for address)

**LEAD ATTORNEY** 

ATTORNEY TO BE NOTICED Defendant University of Massachusetts Medical School

TERMINATED: 07/01/2005 represented by Anthony R. Brighton

Smith, Sovik, Kendrick & Sugnet, P.C.

250 S. Clinton Street, Suite 600

Syracuse, NY 13202-1263

315-474-2911

Email: abrighton@smithsovik.com

TERMINATED: 08/11/2011

ATTORNEY TO BE NOTICED

Stephen M. O'Shea

(See above for address)

ATTORNEY TO BE NOTICED Defendant Luis S. Spencer

Commissioner of the Department of Corrections represented by Joan T. Kennedy

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Richard C. McFarland

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED Movant Christine M. Alexander represented by Christine M. Alexander

PRO SE